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Before the
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
i2way Request for Declaratory Ruling)
Regarding the Ten-Channel Limit)
of Section 90.187(e) of the Commission's)
Rules)
)
Hexagram Petition to Deny i2way)
Applications)

WT Docket No. 02-196

TO: The Commission

PETITION FOR RECONSIDERATION
OF HEXAGRAM, INC.

June 4, 2004

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TO: The Commission

**PETITION FOR RECONSIDERATION
OF HEXAGRAM, INC.**

Pursuant to Section 1.106 of the Commission's Rules, Hexagram, Inc. submits this
Petition for Reconsideration of the Memorandum Opinion and Order (MO&O) in the above-
captioned proceeding.¹

Hexagram files this Petition because the MO&O, on its face, fails to squarely address the
two main contentions Hexagram has raised throughout the proceeding.

¹ *i2way Request for Declaratory Ruling*, WT Docket No. 02-196, Memorandum
Opinion and Order, FCC 04-108 (released May 5, 2004). This proceeding relates to the
following applications and any others that are similarly situated: Application File Nos.
0000361676, 0000361718, 0000362074, 0000362081, 0000362240, 0000362263, 0000362850,
0000362873, 0000363194, 0000363233, 0000363326, 0000363415, 0000365157, 0000365955,
0000366047, 0000366335, 0000366750, 0000367416, 0000367445, 0000367533, 0000367563,
0000367564, 0000367653, 0000367744, 0000367828, 0000367900, 0000367918, 0000368539,
0000368557, 0000368659, 0000368665, 0000368737, 0000368821, 0000368990, 0000368991,
0000369064, 0000369149, 0000369255, 0000369265, 0000369318, 0000369369, 0000369770,
0000369981, 0000369993, 0000370164, 0000370209, 0000370230, 0000370267, 0000370899,
0000372203, 0000372294, 0000372385, 0000372669, 0000373428, 0000373528, 0000376863,
0000400857, 0000402494, 0000420028, 0000421288, 0000432405, 0000485712, 0000544363,
0000544366, 0000544401, 0000545589, and 0000609619.

INTRODUCTION

A. Request for Waiver of Section 1.106(b)(2)

Ordinarily the Commission will reconsider a denied application for review only in light of new, changed, or newly discovered facts.² That rule, however, applies where the petitioner's arguments have previously been considered and rejected.³ Although Hexagram has previously raised the arguments presented below, the Commission failed to consider them, much less resolve them. Hexagram is entitled to have its contentions fully addressed so the parties and reviewing courts can assess the Commission's rationale. Substantively, reconsideration is necessary for the Commission both to maintain uniform application of its substantive rules and to reach a just result in this matter. For each of these reasons, Hexagram respectfully requests a waiver of Section 1.106(b)(2).

B. Factual Background

Petitioner Hexagram, Inc. manufactures, markets, installs, and operates radios for automatic reading of utility meters. Hexagram has deployed nearly 750,000 devices employing fixed RF networks under more than 300 licenses issued to Hexagram and its customers. These are Part 90 transmitters currently operating under the low power rules on 12.5 kHz offset frequencies in the UHF band.

Hexagram systems typically operate tens of thousands of transmitters on the same frequency. Each transmitter emits a short data burst, typically less than 1/10 second, two to four

² 47 C.F.R. Sec. 1.106(b)(2).

³ *E.g., Greater Media Radio Company, Inc.*, 15 FCC Rcd 20485 (2000) ("It is well established that reconsideration will not be granted for the purpose of again debating matters *that have already been fully considered*") (emphasis added).

times each day. A large system might total 10,000 transmissions per hour, spread over 75 receiver cells. Despite their short duty cycle, these devices achieve a very high spectrum efficiency, due to the large number of transmitters deployed. Hexagram's brief data bursts are inaudible to a co-channel voice user. Use of the technology reduces utility costs, enhances customer service, and promotes conservation of energy.

Respondent i2way Corporation filed several dozen applications, each seeking to license scores of 12.5 kHz offset UHF frequencies.⁴ Its application exhibits describe a novel radio technology that scans over large numbers of frequencies to continually move communications among those that are momentarily vacant, even if they are otherwise in use. In requesting permission to implement this potentially intrusive technology, i2way asserted its system would protect "all co-channel users, whether employing modern digital systems or legacy analog equipment."⁵

i2way's amended applications were accepted for filing on December 19, 2001.⁶ The public notice carried no indication that the applications contain an unprecedented request for novel use of the spectrum.

⁴ For example, Application File No. 0000361718, which is typical, lists 133 channels. See note 1 for a list of application file numbers.

⁵ *Statement Detailing A New Technique for the Deployment of Low-Power Frequencies in the 450-470 MHz Band* at 2, attached to Letter from Frederick J. Day, Counsel for i2way Corporation, to FCC, attached to Application File Nos. 0000361676 *et al.* (dated June 5, 2001) (hereinafter "*i2way Statement*") (emphasis added).

⁶ MO&O at para. 2 n.8.

C. Procedural Background

Hexagram filed a Petition to Deny on February 28, 2002, more than 30 days after release of the public notice listing i2way's applications. An included motion for late acceptance explained that Hexagram did not have actual notice of the extraordinary character of i2way's applications until shortly before it filed the Petition. The Petition itself expressed concern that i2way's monitoring system might fail to detect Hexagram's extremely short transmissions, and in that event might consistently choose the Hexagram channels for operation, thus causing near-continuous interference to Hexagram's customers. Hexagram asked the Commission to condition a grant of the applications on a showing that i2way can protect all incumbent users, including Hexagram, just as i2way's applications had represented it would do. That was Hexagram's sole request for relief.

i2way opposed, arguing that Hexagram's Petition was untimely and that i2way has no obligation to protect a secondary user such as Hexagram.

The Bureau dismissed Hexagram's Petition as untimely, rejected it for failure to make a *prima facie* showing, and denied the relief requested as "not relevant."⁷

On Application for Review, the Commission affirmed the Bureau's order. The Commission rejected Hexagram's grounds for late filing with a statement that the standard public notice provides adequate information to alert an existing licensee that the application may affect

⁷ *i2way Request for Declaratory Ruling*, in WT Docket No. 02-196, Order, DA 03-1044 at paras. 12-14 (Wireless Telecom. Bur. released April 1, 2003) (Bureau Order).

existing services.⁸ On the substantive issue, the Commission declined to require protection "beyond that afforded under our rules" for Hexagram's secondary operations.⁹

DISCUSSION

D. The Commission Should Accept Hexagram's Petition to Deny as Timely Or, in the Alternative, Waive its Having Been Filed Late.

Hexagram filed its Petition to Deny more than 30 days after public notice of i2way's applications. Its Motion for Late Acceptance explained that the public notice did not give *actual* notice, or even a hint of actual notice, of the extraordinary nature of the applications. The Bureau correctly quoted Hexagram's argument,¹⁰ but then inexplicably stated, "Hexagram does not provide any explanation for filing its Petition six weeks late."¹¹

On review, the Commission refused to reinstate Hexagram's Petition. The MO&O states:

Hexagram's contention that we provide detailed substantive information about applications in our standard public notices is not only administratively inefficient and overly burdensome, but unnecessary and contrary to established Commission procedures. The standard notice provides sufficient information to alert existing licensees and those with

⁸ MO&O at para. 10.

⁹ MO&O at para. 11. The MO&O did not address the Bureau's alternative ground for dismissing Hexagram's Petition, namely, that Hexagram had failed to make a *prima facie* showing it is a party in interest because it did not specifically identify which i2way applications would infringe on which Hexagram licenses. (Hexagram responded that Hexagram's and i2way's claims of nationwide operation on the same frequencies satisfied the requirement, and also provided examples of overlapping applications and licenses.) The *prima facie* issue is not before the Commission on reconsideration, and we will not clutter the record by briefing it here. Alternatively, if the Commission seeks to rely on that issue, we request an opportunity to comment.

¹⁰ Bureau Order at para. 13 n.38, *quoting* Hexagram Petition to Deny at 1-2.

¹¹ Bureau Order at para. 13.

pending applications that we have received a proposal for service that may affect existing services or other pending proposals.¹²

Respectfully, we submit that this misses the point. Hexagram does not seek "substantive information" in the Commission's "standard public notices" -- at least, not when they announce a standard application. But we do think an extraordinary application that requests an unprecedented departure from the Rules needs something more than the standard two-line entry.¹³

Commission proceedings should not become a "shell game" in which the public must guess which among thousands of innocuous-looking public notice items might hide a novel and possibly threatening use of the applied-for frequencies. Simple fairness obliges the Commission to flag an extraordinary application as such -- or, failing that, to accept a Petition to Deny a few weeks late, when doing so would not prejudice any party. For each these reasons, the equities require acceptance of Hexagram's Petition to Deny *nunc pro tunc*.

E. The Commission Should Require i2way to Show How it Will Protect Hexagram's Operations.

In responding to Hexagram's sole substantive request -- that the Commission hold i2way to its promise not to interfere with other users of the band -- the MO&O raises two closely

¹² MO&O at para. 10.

¹³ This is a typical public notice entry:

0000361676	i2way CORPORATION	HOUSTON	TX	AM
07/20/2001	00451.18750	29-45-26.0 N	095-21-37.0 W	P

Wireless Telecommunications Bureau, Site-By-Site Accepted for Filing, Report Number 926 (released Aug. 1, 2001). No other information is provided.

related issues: whether i2way's applications were properly frequency coordinated; and whether i2way can properly be obliged to protect secondary users such as Hexagram.

1. i2way's applications were not subject to the mandatory frequency coordination procedures.

Hexagram asserts it has been denied the interference protection it would have received had i2way's applications being properly frequency coordinated as the Commission's Rules require.¹⁴ The MO&O responds: "We have no record that i2way sought an exemption from frequency coordination"¹⁵ True, i2way did check "Yes" in the appropriate box, certifying each application had been successfully coordinated.¹⁶ But it is hard to square that certification with i2way's listing of dozens of separate frequencies on the face of the application.

Given the number of frequencies, the coordinator cannot reasonably have made "the review necessary to insure that operations will be interference free."¹⁷ Neither could it have been able to "identify the best available frequency for an applicant, taking into consideration . . . the best interests of other users."¹⁸ In identifying a great many frequencies as best suited to i2way's applications, the coordinator effectively failed to identify any. The purported coordination of far more channels than the rules allow is functionally equivalent to no coordination at all.¹⁹

¹⁴ 47 C.F.R. Sec. 90.129(a).

¹⁵ MO&O at para. 11.

¹⁶ FCC 601, Schedule H, Box 7.

¹⁷ *Operation of Low Power, Limited Coverage Systems*, 94 F.C.C.2d 32, 36 (1983).

¹⁸ *Frequency Coordination in the Private Land Mobile Radio Services*, 103 F.C.C.2d 1093, 1120 (1986).

¹⁹ 47 C.F.R. Sec. 90.187(e) (10 channel limit).

Still, there may be one rationale under which the coordinator could arguably justify having approved 100+ channels for each of i2way's operations. The coordinator might simply have taken at face value i2way's claims that its systems would be invisible to other users,²⁰ and believed that i2way systems could be ignored in all future coordinations "as if the i2way systems were nonexistent."²¹ The coordinator might thus have signed off on the i2way applications while still supposing it had discharged its responsibilities. Unfortunately, those are the same representations that i2way has since disavowed.²² A "coordination" that relied on them is wholly ineffective.

2. ***i2way should either be held to its promise to protect all other users, or else should be held to the same frequency coordination procedures as everyone else.***

i2way's applications asked for extraordinary flexibility in using the band. In return, i2way initially offered other users extraordinary protection.

Discretion to range across scores of frequencies was justified, said i2way, because its system would "automatically bypass *any* frequencies then in use by other systems."²³ Its equipment "is premised on providing a high degree of 'deference' to the communications of other

²⁰ Letter from Frederick J. Day, Counsel for i2way Corporation, to Federal Communications Commission at 1 (dated June 5, 2001) ("*i2way Day Letter*").

²¹ *i2way Day Letter* at 1.

²² Opposition to Petition to Deny of i2way Corporation, File Nos. 0000361676 *et al.* at 4 (filed April 1, 2002) ("As a proposed user on a primary basis, i2way would have no requirement to protect Hexagram's use of frequencies.")

²³ *Note Regarding the Requirement for Access to the Full Panoply of Low-Power Frequencies* at para. B, attached to Application File Nos. 0000361676 *et al.* (filed Dec. 10, 2001) (hereinafter, *i2way Note*) (emphasis added).

users."²⁴ The i2way system "was specifically designed to be 'invisible' to other low-power operations."²⁵ "All co-channel users, whether employing modern digital systems or legacy analog equipment, are protected by this automatic system."²⁶ i2way's equipment "will render i2way's transmissions imperceptible to other users."²⁷ And last: i2way "willingly accepts" placing the burden of avoiding interference "entirely on i2way's system."²⁸

On their face these statements extend to all other users. There is no mention of excluding secondary users such as Hexagram and its customers. The commitments were made in signed applications and are fully binding on i2way.

Yet the Commission declines to enforce these commitments, at least as to Hexagram, solely because:

i2way's applications must be *processed through* a certified frequency coordinator before we process those applications.²⁹

The large number of frequencies listed suggest the applications were indeed "processed through" a frequency coordinator, but no more. There could have been no actual coordination and no assurance of the interference protection that frequency coordination is supposed to provide.

²⁴ i2way *Note* at para. B.

²⁵ i2way *Day Letter* at 1.

²⁶ i2way *Statement* at 2 (emphasis added).

²⁷ i2way *Day Letter* at 1.

²⁸ i2way *Day Letter* at 1.

²⁹ MO&O at para. 11 (emphasis added).

Even secondary users are entitled to the benefits of frequency coordination. In particular, Hexagram looks to coordinators to choose frequencies for primary users that minimize risk of interference to secondary communications, whenever possible. i2way's coordinators seem not to have made the attempt. Perhaps, as suggested above, they relied on i2way's assurances that its system would suffice to prevent interference. Now, however, the Commission's failure to enforce those commitments leaves Hexagram with the protection of neither real frequency coordination nor the technical protections to which i2way committed itself in its applications.

CONCLUSION

Hexagram asks the Commission to reconsider the MO&O in the following respects: (1) acknowledge that the public notice of i2way's applications failed to give adequate notice of their extraordinary character, and accept Hexagram's Petition to Deny *nunc pro tunc*; and (2) either hold i2way to its assurances of non-interference to all users, including secondary users such as Hexagram and its customers, or else require that i2way's applications be subject to the usual frequency coordination procedures over no more than ten channels at a time pursuant to Section 90.187(e).

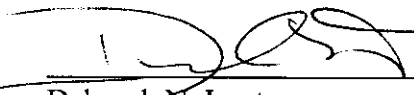
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June 4, 2004

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, an employee of the firm of Fletcher, Heald & Hildreth, PLC, certify that this day of June 4, 2004, I have caused the foregoing "Petition for Reconsideration of Hexagram, Inc." to be sent by first class mail, postage prepaid, to the persons named on the attached service list, except that persons identified as affiliated with the Federal Communications Commission were instead served by hand delivery and by email.


Deborah N. Lunt

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